Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

(20)

No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, ET AL.,
PETITIONERS,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia*, a limited and an accountable government, the proper role of the judiciary, and reasonable government regulation. Excessive regulation, related litigation, and excessive penalties and attorney fee awards add enormous and unnecessary burdens to our economy in the form of increased consumer prices, lower productivity, and loss of jobs.

WLF has participated as amicus curiae in the Supreme Court and lower federal courts in numerous cases that are relevant to this case. In some of those cases, WLF argued that the plaintiffs lacked Article III standing. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 118 U.S. 1003 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990);

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties which have been filed with the Clerk.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

WLF has also challenged the validity of the Environmental Protection Agency's (EPA) flawed BEN Economic Model. EPA and the courts use the BEN Model in cases such as the one at bar to assess civil penalties for environmental violations by computing the economic benefit to the facility for noncompliance. WLF discovered through the Freedom of Information Act (FOIA) that the EPA had suppressed evidence suggesting that the BEN Model exaggerated the economic benefit of noncompliance which resulted in the assessment of inflated civil penalties. *See Washington Legal Foundation v. United States EPA*, CA No. 93-1202 (CRR) (D.D.C. 1996); *see also* 64 Fed. Reg. 32948, 32972 (June 18, 1999) (referring to disclosure of documents in response to WLF's FOIA lawsuit).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as a co-amicus curiae in numerous cases with WLF.

While amici support all of the arguments made by the respondent, WLF will focus upon the jurisdictional issues in this case. In particular, while amici believe the court of appeals correctly decided that this case was moot, amici will argue that the lack of constitutional and statutory standing provide this Court with alternative grounds upon which to affirm the court of appeals.

STATEMENT OF THE CASE

In the interests of judicial economy, amici hereby adopt the Statement of the Case as presented in the respondent's brief. In brief, Laidlaw Environmental Services (TOC), Inc. (Laidlaw) operated a hazardous waste incinerator in Roebuck, South Carolina since 1986 when it was issued a National Pollution Discharge Elimination System (NPDES) permit by South Carolina's Department of Health and Environment Control (DHEC) pursuant to Section 402 of the Clean Water Act. 33 U.S.C. § 1342. The permit authorized Laidlaw to discharge certain waste metals into the North Tyger River within certain limits. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588 (D.S.C. 1998). The prior operator of the facility was permitted to discharge up to 20 parts per billion (ppb). However, DHEC proposed to set the standard for Laidlaw at an exceedingly low level of only 1.3 ppb under EPA's 1986 water quality standard. That level is well below the 2 ppb of mercury considered to be a safe level for drinking water.

Laidlaw expended considerable resources for technical feasibility studies and other costs to achieve this extremely low level of discharge. Through the diligent efforts of Laidlaw's personnel, Laidlaw was able to develop technology to achieve the 1.3 ppb level for mercury. Eventually, the permit was modified to allow for 10 ppb, although it could have been legally set as high as *200 ppb* but for Laidlaw's demonstrated efforts that it could reduce the levels. 956 F. Supp. at 598.

From 1987 to 1992, Laidlaw had intermittently exceeded what the district court referred to as the

"draconian" low limits for mercury despite Laidlaw's best efforts to do otherwise. By 1991, Laidlaw had met the discharge levels for all of its other non-mercury metals. In addition, Laidlaw had committed technical and minor reporting violations that were characterized by the district court as "anomalies." *Id.* at 602. The crucial finding by the court, however, was that there was no showing of environmental harm from these mercury exceedances and reporting errors. *Id.*

Nevertheless, plaintiff Friends of the Earth, having obtained Laidlaw's discharge data that it was required to file with the EPA and DHEC, submitted a 60-day notice of intent to sue letter under the Clean Water Act to Laidlaw and federal and state agencies, even though Laidlaw had been working closely with DHEC to develop ways to prevent the occasional exceedances, and had greatly reduced them. A few days before the 60-day period expired, DHEC and Laidlaw entered into a consent order in state court to resolve the violations and to pay a fine. While the Clean Water Act precludes a citizen suit when such actions have been commenced by state or federal authorities, the plaintiff filed a citizen suit in federal court alleging that they and their members have suffered both informational injuries and harm to their environmental interests in the North Tyger River.

The trial court concluded that the plaintiffs barely had standing, that the suit was not precluded by DHEC's action, imposed civil penalties of approximately $400,000 for the technical violations, but denied plaintiffs' request for declaratory and injunctive relief because of Laidlaw's substantial compliance, good faith efforts, and the lack of environmental harm.

The plaintiffs appealed, claiming that the fines should have been higher, while Laidlaw argued on appeal that the plaintiffs lacked both constitutional and statutory standing to bring the action in the first place. The court of appeals reserved ruling on those issues, and instead held that because the plaintiffs did not appeal the denial of injunctive relief, that meant that the only relief available was the payment of civil penalties by Laidlaw to the U.S. Treasury. However, the payment of fines would not redress any injury suffered by the plaintiffs; consequently, the case was therefore rendered moot by the action of the plaintiffs. 149 F.3d 303, 306 (4th Cir. 1998). In so ruling, the court of appeals relied on this Court's recent decision in *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998). Laidlaw has since closed its facility.

SUMMARY OF ARGUMENT

While this Court can affirm the judgment of the court of appeals either on the mootness grounds relied upon by the court (lack of redressability of the injury by civil fines), or on the more traditional mootness grounds presented in Laidlaw's Suggestion of Mootness (cessation of complained of conduct), amici submit that the judgment can be affirmed on alternative jurisdictional grounds: that the plaintiffs lack both constitutional and statutory standing to litigate this case.

Because the district court found that there was no environmental harm caused by Laidlaw's discharges, neither the plaintiffs nor their members suffered any perceptible and judicially cognizable injury-in-fact, let alone any injury that could be redressed by the imposition of civil penalties. Mere exceedances of a permit, or the plaintiffs' "psychic

concerns" about those exceedances, do not ipso facto constitute injury-in-fact to satisfy the first of three prongs of Article III standing.

Furthermore, the court lacked jurisdiction to adjudicate this case because the plaintiffs lacked statutory standing to file it in the first place. The citizen suit provision of the Clean Water Act authorizes the filing of such suits only where the federal government or state authorities have not commenced and are not diligently prosecuting an action to require compliance. Here, the record indisputably shows that the South Carolina DHEC commenced an action to require compliance, and diligently prosecuted that action *before* the plaintiffs filed a duplicative suit in federal court. J.A. 72. Congress intended that citizen suits should supplement, not supplant, duplicate, or disrupt federal or state agency enforcement of the permits under the Clean Water Act.

In short, this seven-year old lawsuit appears to be less about a case of genuine citizen concern for the protection of the environment, and more about a case of a concern by a few national professional groups to continue exploiting the "citizen suit" provisions of the Clean Water Act for their personal benefit by reaping large attorneys fees awards, and by seeking excessive fines or extorting settlements against responsible companies which have demonstrated their commitment to meet, if not exceed, anti-pollution standards.

ARGUMENT

Even though the court of appeals deferred addressing the issues of statutory and constitutional standing, the petitioners' first question presented to this Court is expressly

premised on their assertion that they possessed standing not only when they filed the underlying action in 1992, but continue to suffer injury-in-fact to this day.[2] Accordingly, the issues of standing, both statutory and constitutional, are presented before this Court, or at least are "subsidiary question[s] fairly included" within the question presented. SUP. CT. R. 14.1(a).

But even if the questions presented did not expressly raise or implicate the standing issue, this Court has an independent duty to determine *sua sponte* whether the plaintiffs have standing and the case is live controversy throughout all successive stages of the litigation. *Juidice v. Vail*, 430 U.S. 327 (1977); *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Federal courts are courts of limited jurisdiction and the "obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party

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[2] Petitioners' first Question Presented states:

> 1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, *where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact* but have not obtained injunctive relief.

Pet. for Cert. at i (emphasis added).

raises the jurisdictional issue and both parties are prepared to concede it." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990); *Secretary of State of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 954, n.4 (1984). This Court has remarked that standing is "perhaps the most important" of jurisdictional doctrines. *FW/PBS Inc.*, 493 U.S. at 230, *quoting Allen v. Wright*, 468 U.S. 737, 750 (1984). In short, standing is a jurisdictional issue that can be raised at any time. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Accordingly, it is entirely appropriate for amici and Laidlaw to challenge FOE's statutory and constitutional standing in this Court just as it was appropriate to challenge it in the court below. Even if the reviewability of statutory standing is not on the same par as the reviewability of constitutional standing, this Court can nevertheless reach the issue, should it become necessary, because "[a] respondent is entitled * * * to defend the judgment on *any* ground supported by the record * * * ." *Bennett v. Spear*, 520 U.S. 154, 161 (1997) (emphasis added).

Because the record is sufficiently developed with respect to these standing issues, and because they are questions of law, this Court can resolve them and affirm the judgment of the court of appeals on either of those grounds.

I. PLAINTIFFS LACK ARTICLE III STANDING

Under the "Case" or "Controversy" provision of Article III of the Constitution, a party seeking to invoke the judicial power of the federal courts must meet three minimum requirements. "First and foremost, there must be an `injury in fact' -- a harm suffered by the plaintiff that is `concrete'

and `actual or imminent, not `conjectural' or `hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A `particularized' injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.*

The plaintiff must make a "factual showing of *perceptible* harm." *Id.* (emphasis added). Standing, the Court emphasized, is not "an ingenious academic exercise in the conceivable." *Id.* Thus, a plaintiff has not suffered a legally cognizable injury where the alleged injury is based on "pure speculation." *Id.* at 567.

In addition to proving that they have suffered an injury in fact, the plaintiffs must show that the injury was caused by or is traceable to the "complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998). Finally, "there must be redressability -- a likelihood that the required relief will redress the alleged injury." *Id.* at 1017. The "party invoking federal jurisdiction bears the burden of establishing" all three elements of Article III standing. *Id.*

This Court has made it clear that the doctrine of standing is grounded in separation-of-power concerns that federal courts do not arrogate to themselves powers which properly belong to the two political branches of government. *Defenders*, 504 U.S. at 560. "As a jurisdictional prerequisite, standing prevents the federal courts from becoming forums for the `ventilation of public grievances' and protects the delicate balance of power shared by the executive, legislature, and judiciary." *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

A. Plaintiffs Have Not Satisfied the Injury-in-Fact Requirement of Standing.

In the case at bar, the plaintiffs allege that Laidlaw exceeded the mercury permit levels under its NPDES permit over several years based upon information readily obtained from the Daily Monitoring Reports (DMRs) required to be filed by Laidlaw with the EPA and South Carolina DHEC. But the "mere exceedance of a permit limit" is insufficient to show injury-in-fact for purposes of Article III. *See PIRGNJ v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121 (3d Cir. 1997). Just because Congress authorized the filing of citizen suits (under limited circumstances) in federal court to enforce permits, that does not mean that mere violations of those permits ipso facto constitute the requisite injury-in-fact that must be alleged and proven by the preponderance of the evidence to satisfy Article III. Petitioner's amicus is wrong when it suggests that "Congress . . . defined the relevant `injury' as a `violation' of the applicable limitations." Brief of Americans for the Environment at 17.[3]

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[3] To use another example, assume Congress had enacted a law allowing citizen suits against those drivers who exceed the posted speed limits on interstate highways. Mere allegation by a plaintiff that a defendant exceeded the posted speed limit several times, or even a thousand times (for example, by traveling 56 miles per hour (mph) in a 55 mph zone), does not ipso facto translate into a perceptible, cognizable injury-in-fact to the plaintiff, even if the plaintiff drives on the same highway as the defendant. That is so because the plaintiff has not shown that he or she suffered any perceptible injury because the defendant exceeded the speed limit.

In setting acceptable levels of discharge for various pollutants, the EPA builds a margin of safety into the standard. Thus, even if the water quality were technically "harmed" by Laidlaw's exceedances, the plaintiffs must still prove that they -- and not just the water -- suffered perceptible rather than speculative or abstract harm from the excess discharge of mercury.[4]

In the instant case, the plaintiffs made "boilerplate" allegations of harm on behalf of themselves and their members. J.A. 30-36.[5] The allegations of institutional injuries centered around minor technical reporting and

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[4] Even petitioners' amici Natural Resources Defense Council, *et al.*, acknowledge this principle: "[I]t is the effect of the illegal mercury discharges on the plaintiffs, not the effect on the river, that is the focus of the Article III inquiry." Amici Br. of Natural Resources Defense Council, *et al.*, at 8, n.9. But if there is no effect on the river, *a fortiori*, there can be no effect on the plaintiffs. Mere "concerns" about the state of the quality of the environment are simply too abstract to confer standing under Article III. *Steel Co.*, 118 S. Ct. at 1019.

[5] All three plaintiff organizations filed suit "on behalf of [themselves] and [their] members." J.A. 30, 32, 34. However, Congress authorized the commencement of citizen suits only by a person "on his own behalf." 33 U.S.C. § 1365(a). Consequently, only the harm to the institutional interests of the three plaintiff organizations are properly the focus of whether they have suffered a cognizable and redressable injury in fact. *Cf. Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1015, n. 6 (citizen suit provision authorizing suits by a plaintiff only "on his own behalf" arguably permits plaintiffs "to vindicate only its own interests as an organization, and not the interest of its individual members").

monitoring violations; and the allegations of environmental harm to the organizations' members were cast in vague and conclusory terms.[6]

While these vague and generalized grievances may have been sufficient to survive a motion to dismiss, this case was argued and tried on the merits. Consequently, the plaintiffs have the burden of proof and persuasion to demonstrate the existence of injury-in-fact and the other elements of standing throughout all stages of the proceedings. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

Here, the plaintiffs not only failed to show that the excursions by Laidlaw harmed any aquatic life, the district court found the opposite: Laidlaw's discharges caused no harm to the environment. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 956 F. Supp. 588, 600-02 (D.S.C. 1997).

For example, Laidlaw introduced the results of its nine years of semiannual acute and chronic toxicity tests, the results of a fish tissue study on bluegill sunfish in the North Tyger River, and the results of a second fish tissue study on large mouth bass and other species of fish in the River. Based on these tests, expert testimony, and the testimony of

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[6] The Complaint alleges that the "Defendant's discharge of pollutants in violation of its permit number SC0040517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic, and environmental interests of FOE's members." J.A. 31, ¶ 8. Essentially identical conclusory language was used to describe the so-called injury to the members of plaintiff Citizens Local Environmental Action Network, Inc. (J.A. 33, ¶ 12) and to the members of plaintiff Sierra Club (J.A. 35, ¶ 16).

various witnesses of the South Carolina DHEC, the court found that the water quality standard for mercury had been attained and that the overall quality of the river "exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water." *Id.* at 600.

Specifically, the fish tissue studies both showed that levels of mercury in the sampled fish were well below the Food and Drug Administration action level of 1.0 milligram per kilogram of fish tissue examined. The DHEC fish study showed no mercury above the detection limit of 0.25 mg/kg, less than one quarter of the level necessary to trigger the FDA action level. The court further found that:

> Laidlaw's macroinvertebrate assessments, which were performed two times per year between 1986 and 1994, and 96-hour flow-through bioassays, which were also performed during this same time period, showed that prior mercury discharge limits as high as 20 ppb *had no adverse effect on the indigenous biological community in the North Tyger River downstream from Laidlaw's facility*.

Id. (emphasis added).

Under circumstances very similar to this case, the Third Circuit found that while the plaintiff organizations may have initially alleged sufficient harm to survive a motion to dismiss, they lacked standing where the trial court ultimately found that although the company in that case technically violated its NPDES permit, there was no harm to the environment. *PIRGNJ*, 123 F.3d 111 (3d Cir. 1997). The Third Circuit also rejected the plaintiffs' claim that their

mere knowledge of the technical violations by the company constituted sufficient injury-in-fact. *Id.* at 120-21.

Plaintiffs' alleged institutional interest in obtaining information required to be reported by Laidlaw was also not perceptibly affected by the technical monitoring and reporting violations. "Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no environmental impact. There has been no demonstrated proof of harm to the environment." 956 F. Supp. at 602. The court even found that, in proposing a penalty to the court, plaintiffs' use of the value range in EPA's Penalty Policy that was indicative of the least amount of health or environmental harm "constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit *did not result in any health risk or environmental harm.*" *Id.* (emphasis added). Most significantly, the violations "did not result in DHEC [or the plaintiffs] being misled or ignorant as to the type or extent of compliance difficulties Laidlaw was experiencing." *Id.*

The court in *PIRGNJ* also soundly rejected a similar argument made by the plaintiffs in that case that the monitoring and reporting violations caused sufficient injury-in-fact. The court reasoned that implicit in the argument that the plaintiff needed the information to enforce the Clean Water Act was the assumption that the company "posed a real threat to the environment." 123 F.3d at 124. Because the facts showed otherwise, and because the alleged injury was not redressable, the plaintiffs failed to establish standing

in that case. *Id.* at 124-25.[7] The same result show obtain here.

Recently, the Fourth Circuit similarly ruled in *Friends of the Earth v. Gaston Cooper Recycling Corp.*, ___ F.3d ____, 1999 U.S. App. LEXIS 11201 (4th Cir. June 2, 1999), that plaintiffs' allegations of injury were insufficient to confer standing. There was no showing in that case that the company's discharges caused environmental harm to the portion of the waterbody used by the plaintiffs; rather, the court concluded that the concerns of the plaintiffs about the quality of the waterbody was "based on mere speculation." *Id.*

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[7] Thus, the information injury alleged in this case is quite unlike the informational injury found by this Court to have existed in *Federal Election Comm'n v. Atkins*, 118 S. Ct. 1777 (1998). In *Atkins*, the plaintiffs alleged that the putative political committee was not filing *any* financial information with the FEC that would assist the plaintiff in evaluating candidates for public office. Similarly, the plaintiffs in *Public Citizen v. Department of Justice*, 490 U.S. 440, 449 (1989) alleged informational injury because the putative advisory committee failed to disclose *any* information otherwise required to be disclosed by the Federal Advisory Committee Act. In *Sierra Club v. Simpkins*, 847 F.3d 1109 (4th Cir. 1998), the company failed to file *any* discharge reports for over two years, and thus deprived plaintiffs and regulators of substantial information regarding harm to the environment.

In the case at bar, on the other hand, Laidlaw's reporting violations were technical and insignificant in nature, and caused no information injury to the plaintiffs. Indeed, the plaintiffs relied on Laidlaw's monitoring reports to file this lawsuit and presumably to inform its members about the water quality of North Tyger River.

Other courts have begun to take their constitutional duties seriously by closely examining the allegations of injury in environmental lawsuits, and if found wanting, have dismissed those cases for lack of standing. *See, e.g.*, *Informed Citizens United, Inc. v. USX Corp.*, 1999 WL 76266 (S.D. Tex. Feb. 9, 1999) (allegations that filling wetlands would interfere with plaintiff's wildlife viewing "falls far short" of establishing injury-in-fact); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996) (plaintiffs failed to show how allegedly illegal air emissions adversely affect health, environment, and recreational interests).

B. Plaintiffs Have Failed to Demonstrate That Laidlaw Has Caused The Alleged Environmental Injuries To Their Members Which Can Be Redressed.

While it is true that the mercury exceedances were caused by Laidlaw, that does not necessarily mean that Laidlaw is the source of the environmental injury allegedly suffered by the plaintiffs' members. Concomitantly, if Laidlaw's mercury exceedances are not the source of the injury to plaintiffs' members, the injunctive relief requested in the Complaint would certainly not redress those injuries. As will be demonstrated, the plaintiffs failed to satisfy these second and third prongs of Article III standing.[8]

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[8] Amici agree with the court of appeals that the civil fines ultimately imposed by the district court do not redress plaintiffs' environmental injuries. 149 F.3d 303, 307 (4th Cir. 1998); *Steel Co.*, 118 S.Ct. at 1019. The argument that fines provide general deterrence to prevent violations by Laidlaw of its permit at *other* plants is putting the cart before the horse: the plaintiffs have not properly shown that Laidlaw has violated any of its other permits or that plaintiffs or their members have been injured if there were any such violations. The belated Affidavit of Bruce Terris, counsel for plaintiffs, to show otherwise is wholly conclusory, woefully inadequate, and not based on personal knowledge. *See* January 19, 1999 Affidavit of Bruce J. Terris, attached to Petitioners' Reply to Opp. Cert. at 33a. Properly viewed, the interest in general deterrence is one that is shared by the public at large. *Steel Co.* 118 S. Ct. at 1019; *Dubois v. U.S. Dep't of Agriculture*, 20 F. Supp.2d 263 (D.N.H. 1998).

We are told by the petitioners that they have members "who use or refrain from using the waterways affected by Laidlaw's discharge" of mercury above the permitted levels. Pet. Br. at 6. This statement, of course, tells us absolutely nothing about whether those who use the waterways are (or were) adversely affected by Laidlaw's discharge of mercury over and above the limit allowed by the NPDES permit, and whether those who refrain from using the waterways do (or did) so *because of* Laidlaw's intermittent exceedances.

We are next told that the plaintiffs' members:

> would like to picnic, birdwatch, and hike near, boat on, and eat fish from the North Tyger River and downstream waters but either do not do so or are *concerned* when they do so *because of the pollution in the River*. They are also *concerned* about the impact of that pollution on the value of their homes and on their dairy products because cows drink from the River.

Pet. Br. at 6 (citing to Affidavits). In the first place, it is highly questionable whether these are genuine interests possessed by these individual members, or whether they

were newly found and manufactured *after* this lawsuit was filed. *See generally* Hr'g Tr., June 30, 1993.[9]

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[9] During the hearing on the motion for summary judgment on the standing issue, counsel for Laidlaw pointed out to the court in some detail that the depositions of plaintiffs' affiants contradicted the boilerplate affidavits that had been drafted for them by the plaintiff organizations; at one point, counsel accused the plaintiffs' attorney of violating Rule 11. Hr'g Tr. at 31. According to Laidlaw's counsel, affiants Curtis and Moore, the two principal witnesses "either recanted or denied most what they said in their affidavit[s]" in their depositions. Hr'g Tr. at 3. For example, Mr. Curtis was asked in his deposition whether the reason he stopped visiting the river was because of the pollution. He answered "No." When asked whether he had any desire to go back to the river, he responded, "I haven't, no." *Id.* at 35.

Ms. Moore indicated in her affidavit that she "would like to use the North Tyger River" for "picnicking and other recreation" but is concerned that the River contains harmful pollutants. Moore Aff. ¶ 4. Yet she testified in her deposition that she had only been near the river once in 1980 when she was visiting a friend who happened to live near the river, and did not visit the river again until *after* this lawsuit was filed. Hr'g Tr. at 7. Ms. Moore further testified on direct that she did not have "any interest" in going to the North Tyger River prior to the filing of this lawsuit. *Id.* at 8. On cross-examination by plaintiffs' attorney, she speculated that she only "might" want to visit the river. *Id.* She also stated in her affidavit that she wanted to take her students to the river to study pollution. Hr'g Tr. at 36. But when she was deposed, she said she had not taken them there. *Id.* But even if Ms. Moore had taken her students on the trip, that obviously would not constitute an injury-in-fact because the goal of the trip was to see and study pollution.

Secondly, assuming that these interests are legitimate and not speculative ones as amici submit, the petitioners state in their brief that they do not engage in certain activities or do so with some concern "because of the pollution in the River." Pet. Br. at 6. Laidlaw's discharge of mercury above the permitted limits is certainly not the cause of all the "pollution" in the river, nor indeed, is the discharge any part of the pollution that impacts these alleged interests. For example, there is absolutely no showing by the plaintiffs that when Laidlaw exceeded its mercury discharge limit of 1.3 parts per billion by another part per billion or fraction thereof, the plaintiffs' members could not "picnic, birdwatch, or hike near," or "boat on" the North Tyger River, or that these activities were impaired in any perceptible manner.

There are other companies and entities in the geographical area which discharge pollutants into the North Tyger River. In addition, by plaintiffs' own admission, there are also farms and dairies nearby whose livestock use the river. Pet. Br. at 6 ("cows drink from the River"). EPA estimates that 65% of stream pollution is caused by unregulated nonpoint sources compared to 26% caused by municipal and industrial point sources combined. EPA, ENVIRONMENTAL PROGRESS AND CHALLENGE: EPA'S UPDATE 46 (1988). Thus, not only have the plaintiffs failed to show that Laidlaw is the source of their pollution concerns, they have failed to show that their concerns would be redressed by a favorable opinion. For example, Affiant Curtis claims in his affidavit that the North Tyger River "looks and smells polluted" (Curtis Aff. ¶ 3). Yet there was no showing that the trace levels of mercury from Laidlaw's facility contribute to water turbidity or produce

malodorous compounds to make the River "look and smell polluted."

Plaintiffs' members also express concern about eating fish from the River and drinking milk from a local dairy whose cows drink water from the River. In the first place, the record shows no environmental harm to fish from Laidlaw's discharges. The same can be said about the milk from cows who drink from the river. There is absolutely no proof that the retail fish and milk supplies in the area have been tainted by Laidlaw's mercury discharges, or that governmental health and safety procedures would not detect such levels before the products were shipped to market.

Secondly, the affiants suggest in their depositions that they buy their fish at the supermarket, and prior to the filing of this lawsuit, they had no concern about where the fish came from. Hr'g Tr. 19. But even assuming that the plaintiffs' members would refrain from drinking milk or eating fish that came from the river because of the presence of mercury, that injury cannot be redressed by a favorable ruling because Laidlaw is permitted to discharge mercury, albeit up to a limit, into the river. Thus, the plaintiffs would apparently continue to avoid or be "concerned" about eating fish or drinking milk because of the presence of even lawful amounts of mercury in the River.

Even if it could be demonstrated that Laidlaw contributed in some minute way to the pollution in the North Tyger River, plaintiffs would not have satisfied the redressability prong of standing because there was no showing that the water quality would improve in any

perceptible degree to remedy affiants' so-called injuries, psychological or otherwise.[10]

Despite the fact that Laidlaw's discharges caused no environmental harm, that the "overall quality of the river exceed levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water" (956 F. Supp. 600), and that Laidlaw has long ceased operating the facility, the plaintiffs are nevertheless claiming that they are still suffering an injury in fact to this very day. Pet. Cert. at i. Clearly, these continuous "injuries" were and are being caused by sources other than Laidlaw, and are not redressable by a ruling against Laidlaw.

In short, plaintiffs have failed to satisfy any of the three prongs of standing under Article III. The failure to satisfy any one of them necessitates the dismissal of this case for lack of jurisdiction.

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[10] In that regard, the plurality opinion in *Defenders* on this issue is instructive. There, the government contributed only "10% of the funding for the Mahaweli Project" alleged by plaintiffs to be harmful to endangered species; but the plaintiffs "have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated * * * * There is no standing." 504 U.S. at 571. In the instant case, because there was no showing that plaintiffs' so-called injuries from all of the pollution in the river were attributable to Laidlaw's intermittent mercury exceedances, there can be no showing of redressability.

II. PLAINTIFFS LACK STATUTORY STANDING

Section 505(b)(1) of the Clean Water Act states that "[n]o action may be commenced * * * if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil * * * action in a court of the United States, or a State to require compliance with the standard, limitation, or order * * * ." 33 U.S.C. § 1365(b)(1). Congress enacted this provision recognizing the primary role of the appropriate governmental agencies to enforce the Clean Water Act, and to prevent potentially intrusive citizens suits. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987).

To be sure, this Court in *Steel Co.*, made it clear that the Court must first determine whether it has Article III jurisdiction before it addresses a merits question. *Steel Co.* 118 S. Ct. at 1010-12. In doing so, the Court rejected the "doctrine of hypothetical jurisdiction" whereby jurisdiction is assumed to reach a merits question, the resolution of which would also result in dismissal of the suit. "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 1012.

In response to Justice Stevens concurring opinion in *Steel Co.* that a statutory standing question can be adjudicated before difficult the constitutional question, the majority countered that the issue Justice Stevens would address was not a statutory standing question, *i.e.*, "whether EPCRA authorized this plaintiff to sue (it assuredly does), but whether the scope of the EPCRA right of action includes

past violations." *Id.* at 1011. The Court opined that that was a merits question, not a jurisdictional one. *Id.*

In the case at bar, however, federal courts are not authorized to entertain citizen suits unless the federal government or state agency has not commenced and is not diligently prosecuting a civil or criminal case. Thus, in certain respects, this provision appears to be a statutory standing question: does the citizen suit provision allow *these* plaintiffs to file a citizen suit in federal court where State authorities have commenced and have diligently prosecuted an action?

It is clear from the record in this case that South Carolina DHEC commenced and diligently prosecuted a civil action against Laidlaw. J.A. 72. Yet the district court erroneously concluded that the *results* obtained by state authorities in its enforcement action, namely the amount of civil penalties, were not considered to be severe enough, and that private parties such as the plaintiffs were given little chance to intervene in the exercise of the State's executive power. J.A. 118. Amici submit, however, that the severity of the judgment -- whether entered as a consent order or by a state court after a trial -- or the existence of opportunities for intervention by private parties in the state enforcement action, does not mean, as a matter of law, that the State did not diligently prosecute the action.

While lower court decisions have interpreted the meaning of "civil or criminal action" narrowly, for example, by ruling that citizen suits are not precluded while *administrative* rather than court actions have been

undertaken,[11] nothing in the statute or any regulation requires that certain levels of punishment or relief be obtained by federal or state authorities to be determinative of whether a prosecution of an action has been diligent or not. If anything, the filing of the complaint and consent order by state authorities within a few days of each other shows that the agency was *super* diligent in prosecuting the action, rather than dilatory.[12]

Accordingly, it is clear that an action was commenced and diligently prosecuted before the plaintiffs filed their suit. For these reasons, this Court can affirm the court of appeals on this statutory jurisdictional ground as well.

III. THE PUBLIC INTEREST IS NOT SERVED BY CITIZEN SUITS SUCH AS THIS ONE

While Congress provided for citizen suits in the Clean Water Act as well as in many other environmental statutes, Congress did not intend that they would generate disruptive and needless litigation by professional interest groups more concerned with their attorneys' fees and the exaction of fines than genuine environmental protection. In the view of many observers, "citizen suits border[] on extortion and allow[] environmentalists to maintain suits for technical violations

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[11] *See, e.g., Washington Area Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

[12] It is common practice for agencies such as the Securities and Exchange Commission, the Federal Trade Commission, and similar law enforcement agencies to file simultaneously a lawsuit against a defendant and a consent judgment for entry by the court.

so trivial that they had not warranted governmental enforcement." Richard Lazarus, *Rise and Demise of the Citizen Suit*, 15 Envtl Forum, No. 5 at 8 (Sept.-Oct. 1998).

One commentator astutely concluded that the "real purpose and effect of citizen suits is not efficient law enforcement but the subsidization of political constituencies * * *." Michael Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 392 (1990). Most of the citizen suits are brought by a "cartel" of professional environmentalist groups that take "less than a half-day * * * to train student volunteers to scan [the company's] DMRs and identify infractions." *Id.* at 354. Notice of Intent to Sue letters are fired off, and companies are pressured into "settling" for minor or technical violations which otherwise would be subjected to excessively high statutory penalties. Laidlaw's commitment to defend itself rather than settle is the exception, not the rule.

The Clean Water Act in particular, in contrast to most citizen suit environmental statutes, allows the private plaintiff to seek not only injunctive relief, but civil fines as well. 33 U.S.C. § 1365(a). While this enforcement power raises serious separation of powers concerns, the motivation to obtain large fines for the U.S. Treasury is not necessarily altruistic:

> Economically speaking, the requirement that all fines be paid to the Treasury is a 100% tax on the private enforcer's recovery. Taxation creates a differential between the enforcer's expected gain from enforcement and the violator's expected loss from enforcement. This, in turn, means that "both the apprehended offender and the enforcer would be better

off if they negotiated a private transfer payment that was less than the statutory fine but greater than the fine minus the tax."

Id. at 357 (*quoting* RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 561 (3d ed. 1986)).

An objective review of the actions that Laidlaw undertook to limit its mercury discharge indicates that the company was a model of corporate responsibility. The district court's finding that Laidlaw's infractions caused no environmental harm and the plaintiffs' last-minute scramble to find "injured" members speaks volumes about the interests that are really at stake in this citizen suit. If the plaintiffs insist on calling upon the federal courts to devote their scarce judicial resources to adjudicate these kinds of cases, this Court should scrupulously insist that these groups are properly invoking the court's power.

CONCLUSION

For the foregoing reasons, and those provided in Laidlaw's brief, amici curiae urge this Court to affirm the judgment below, and to remand this case to the court of appeals with directions to vacate the district court judgment.

Respectfully submitted.

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Date: July 19, 1999